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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Heather Martin,

Plaintiff,

v.

Carolyn W. Colvin,

Defendant.

No. CV-13-00625-PHX-BSB

ORDER

Heather Martin (Plaintiff) seeks judicial review of the final decision of the Commissioner of Social Security (the Commissioner) denying her application for disability insurance benefits and supplemental security income under the Social Security Act (the Act). The parties have consented to proceed before a United States Magistrate Judge under 28 U.S.C. § 636(b) and have filed briefs in accordance with Local Rule of Civil Procedure 16.1. For the following reasons, the Court affirms the Commissioner's decision.

I. Procedural Background

On September 29, 2010, Plaintiff applied for disability insurance benefits under Title II. (Tr. 139-40.)¹ She alleged disability beginning on July 16, 2010. (Tr. 139.) The Social Security Administration (SSA) denied Plaintiff's claims initially and on

¹ Citations to "Tr." are to the certified administrative transcript of record. (Doc. 19.)

1 reconsideration, and she requested a hearing before an administrative law judge (ALJ).
2 (Tr. 121.) After conducting a hearing, the ALJ issued a decision finding that Plaintiff
3 was not disabled under the Act. (Tr. 12-23.) This decision became the final decision of
4 the Commissioner when the Social Security Administration Appeals Council denied
5 Plaintiff's request for review. (Tr. 1-8); *see* 20 C.F.R. § 404.981 (explaining the effect of
6 a disposition by the Appeals Council.) Plaintiff now seeks judicial review of this
7 decision under 42 U.S.C. § 405(g).

8 **II. Medical Record**

9 The record before the Court establishes the following history of diagnosis and
10 treatment related to Plaintiff's health.² The record also includes an opinion from a State
11 Agency Physician who examined Plaintiff, but who did not provide treatment, and a lay
12 witness statement.

13 **A. Treatment Records**

14 Due to injuries Plaintiff sustained in a car accident, Plaintiff had surgery to fuse
15 two vertebrae levels of her cervical spine (C1-C2). (Tr. 306.) In August 2006, Plaintiff
16 saw neurologist George Wang, M.D., with complaints of continuing neck pain that
17 radiated into her arms. (Tr. 293, 306.) On examination, Plaintiff had full strength in her
18 upper and lower extremities, except for decreased muscle strength in her left bicep.
19 (Tr. 307.) Dr. Wang also noted that Plaintiff had "mildly decreased sensation on the left
20 upper extremity." (*Id.*) She had normal coordination, normal gait, and intact hearing.
21 (*Id.*) The results of her neurological tests were consistent with mild cervical
22 radiculopathy at vertebrae levels C5 and C6, but were otherwise normal. (Tr. 293-94,
23 307.) Plaintiff reported decreased neck pain with Neurontin, but said she still had
24 dizziness and drowsiness. (Tr. 303.)

25
26 ² In addition to physical impairments, Plaintiff alleged several mental
27 impairments in her application for disability benefits. (Tr. 181.) However, the ALJ
28 found that Plaintiff's alleged mental impairments did not cause any limitations in her
mental functional abilities. (Tr. 15-16.) Plaintiff does not dispute this finding. Rather,
her claims relate to the ALJ's findings regarding her physical functional abilities.
Accordingly, the Court discusses only the evidence related to Plaintiff's physical health.

1 On December 15, 2006, Plaintiff saw pain management specialist Nand K.
2 Bhardwaja, M.D., and had several facet injections and an epidural steroid injection (ESI)
3 in her cervical spine. (Tr. 252-63.) Her pain did not significantly improve after the
4 treatment. (Tr. 259.) Dr. Bhardwaja recommended that Plaintiff see a physical therapist,
5 but Plaintiff refused, stating that physical therapy had not helped in the past. (Tr. 259.)
6 He advised Plaintiff to try Tai Chi and yoga to help with stress, her posture, and her range
7 of motion. (*Id.*) He also told Plaintiff that she would “benefit from” biofeedback therapy
8 and recommended that she continue treatment with Dr. Wang. (*Id.*)

9 From mid-2007 through mid-2010, Plaintiff saw her family practitioner several
10 times for various complaints and medication refills. (Tr. 342-64.) On July 16, 2010,
11 Plaintiff saw Dr. Wang “to follow-up” on her complaints of radiating neck pain.
12 (Tr. 289.) She reported a progressive worsening of neck pain and mobility issues.
13 (Tr. 291.) She also complained of migraines, “motion sickness,” and dizziness. (*Id.*)
14 Dr. Wang diagnosed Plaintiff with cervical radiculopathy, migraine with aura,
15 vertigo/dizziness, back pain with paresthesia, and he ordered diagnostic testing.
16 (Tr. 291.)

17 An electroencephalography (EEG) to assess Plaintiff’s “dizzy spells” was normal.
18 (Tr. 264.) Nerve conduction studies (an electromyogram or EMG) showed cervical
19 radiculopathy at the C5 and C6 vertebrae levels of Plaintiff’s spine, but were otherwise
20 normal. (Tr. 265-67.) Nerve studies also showed a sensory polyneuropathy affecting
21 Plaintiff’s right leg. (Tr. 270.) An MRI of Plaintiff’s brain related to her migraines was
22 normal. (Tr. 276.) An MRI of Plaintiff’s cervical spine showed some widening of the
23 joint space suggesting subluxation (partial dislocation). (Tr. 278.) An MRI of her
24 lumbar spine showed “mild disc bulge” at the L4-L5 vertebrae level with “mild foraminal
25 narrowing with disc material approaching the undersurface of both exiting L4 nerve roots
26 with bilateral neural foramen.” (Tr. 277.)

27 To test for peripheral vestibular dysfunction in relation to Plaintiff’s dizziness,
28 vertigo, and motion sickness, Dr. Wang ordered a videonystagmography (VNG) study

1 that was conducted on August 13, 2010. (Tr. 275, 291.) The VNG study was abnormal,
2 which the audiologist indicated was “likely due to peripheral vestibular dysfunction.”
3 (*Id.*) However, the audiologist stated that the test was “inconclusive due to incomplete
4 caloric” and she recommended that Plaintiff return to complete additional testing and
5 follow up with Dr. Wang. (Tr. 275.) Dr. Wang subsequently diagnosed Plaintiff with
6 “peripheral vertigo.” (Tr. 284.) He recommended that she continue home exercises for
7 her neck pain and pursue physical therapy for “vestibular exercise.” (Tr. 284, 287.)

8 Plaintiff saw Dr. Wang again on August 20, 2010. (Tr. 286.) His treatment notes
9 state that Plaintiff had numbness and tingling in her upper extremities, and chronic
10 headaches with nausea, photophobia, and phonophobia. (*Id.*) During a September 3,
11 2010 appointment with Dr. Wang, Plaintiff complained of dizziness and vertigo that
12 caused nausea. (Tr. 282-84.) She had a gait imbalance and a positive Rhomberg’s test.
13 (*Id.*)

14 On September 9, 2010, Plaintiff began physical therapy for vestibular
15 rehabilitation to address her vertigo, motion sickness, nausea, and dizziness. (Tr. 381.)
16 Dr. Wang prescribed twelve sessions in six weeks. (Tr. 381, 396-97.) Plaintiff returned
17 to physical therapy two weeks later. (Tr. 394 (9/23/10), Tr. 395 (Plaintiff cancelled a
18 9/20/10 appointment).) She reported that she had not been diligent with her exercises
19 because she had shingles. (Tr. 394.) She missed her next scheduled appointment.
20 (Tr. 393 (9/27/10)), and cancelled the following appointment. (Tr. 392 (10/1/10).) When
21 Plaintiff returned on October 4, 2010, she reported increased dizziness and nausea with
22 activities of daily living. (Tr. 391.) Plaintiff’s therapist advised her to do her home
23 exercise program and sleep on her left side for several nights. (*Id.*). A few days later,
24 Plaintiff reported that she was “a little better,” but that she still had to “focus on slow
25 [movements].” (Tr. 390 (10/6/10).)

26 Plaintiff cancelled an October 13, 2010 appointment, and next attended physical
27 therapy on October 18, 2010. (Tr. 388-89.) Plaintiff reported that she was only doing her
28 eye and head movement exercises on days when she felt well enough to try them.

1 (Tr. 388.) Plaintiff's therapist observed that Plaintiff still became dizzy or nauseated
2 with exercise, but noted that she recovered more quickly than at her previous therapy
3 sessions. (*Id.*) Plaintiff did not go to physical therapy after October 18, 2010.

4 Plaintiff saw Dr. Wang for a follow-up on November 23, 2010, and she reported
5 that vestibular rehabilitation had made her symptoms worse. (Tr. 443-45.) However,
6 Dr. Wang advised Plaintiff to try physical therapy again. (Tr. 443-44.) Plaintiff also
7 reported that oxycodone helped her neck pain and headaches. (Tr. 445.) Dr. Wang
8 prescribed medication and advised Plaintiff to continue with exercise and massage
9 therapy at home. (Tr. 445-46.)

10 In January 2011, Plaintiff went to Infinite Wellness several times for chiropractic
11 care for her neck and back pain. (Tr. 419-22.) Plaintiff reported increased pain with
12 walking, standing, driving, recreation, and sleeping. (Tr. 419.) Her chiropractor
13 repeatedly noted that Plaintiff's pain was showing improvement. (Tr. 421-22.)

14 **B. Examining Physician**

15 On December 7, 2010, Jeffrey Levison, M.D., reviewed Plaintiff's treatment
16 records and examined her in relation to her application for disability benefits. (Tr. 401-
17 09.) Dr. Levison noted Plaintiff's "allegations" of depression, anxiety, post-traumatic
18 stress disorder (PTSD), headaches, radiculopathy, peripheral neuropathy, peripheral
19 vestibular disorder (dizziness and nausea), and chronic back and neck pain. (Tr. 405.)

20 On examination, Plaintiff had a full range of motion in her joints and her spine.
21 (Tr. 405.) She had no tenderness in her spine. (*Id.*) She had full muscle strength in her
22 arms and legs, a normal gait, and full grip strength. (*Id.*) Dr. Levison noted that, with
23 distraction, Plaintiff "moved her neck freely," "but on direct observation she [was] more
24 methodical about the range of motion, which is complete." (*Id.*) Dr. Levison concluded
25 that the "examination [was] completely normal from head to toe." (Tr. 405.) He stated,
26 however, that he would consider Plaintiff's allegations when assessing her functional
27 abilities. (*Id.*) Dr. Levison opined that, in an eight-hour workday, Plaintiff could lift fifty
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1 pounds occasionally and twenty pounds frequently. (Tr. 406.) He also opined that
2 Plaintiff had no limitations on walking, standing, or sitting. (Tr. 407.)

3 **C. Lay Witness Statement**

4 In October 2010, Plaintiff's sister Lacey Brimmer completed a third-party function
5 report. (Tr. 195-202.) She indicated that Plaintiff's daily activities were limited by pain,
6 dizziness, and nausea. (Tr. 196, 200.) She said that Plaintiff could not do housework due
7 to arm pain and that she washed Plaintiff's hair for her and made her meals. (Tr. 196-97.)
8 She reported that driving a car made Plaintiff dizzy and nauseous. (Tr. 198.) She also
9 testified that Plaintiff rarely went outside and did not shop. (*Id.*)

10 **III. Plaintiff's Background and Administrative Hearing Testimony**

11 At the time of the administrative hearing, Plaintiff was in her late thirties with a
12 high school education and certifications as an aesthetician and makeup artist. (Tr. 182.)
13 Her past relevant work included administrative assistant, accounting manager, office
14 manager, and aesthetician. (Tr. 82.)

15 Plaintiff testified at the December 2011 administrative hearing. (Tr. 62-80.) She
16 testified that she could not work due to motion sickness, dizziness, and nausea stemming
17 from neck injuries she sustained in 1999. (Tr. 70.) Plaintiff stated that she left her job as
18 an administrative assistant in early 2010 "to do what [she] love[d], which is aesthetics
19 work." (Tr. 63, 71.) Plaintiff started working for a plastic surgeon in 2010. (Tr. 63.)
20 She was later asked to resign because she was often sick and undependable. (Tr. 72.)

21 Plaintiff testified that she had migraines, which she treated with sleep and taking
22 Excedrin. (Tr. 73.) Plaintiff also testified that she had migraines as often as two to three
23 times a week. (Tr. 73.) She testified that she could sit or stand for about ten to fifteen
24 minutes at a time. (Tr. 74.) She stated that, due to her nausea and dizziness, she could
25 only walk about ten to fifteen yards at a time. (*Id.*) She could lift a gallon of milk. (Tr.
26 76.) She testified that she spent most of the day lying down, napped for three to four
27 hours, and was out of bed for about an hour a day. (Tr. 77.) She testified that she had
28 lost about seventy-five percent of the range of motion in her neck. (Tr. 74.) She could

1 not focus to read a book or newspaper for very long without “feeling motion sick.”
2 (Tr. 74-75.) Plaintiff testified that although she could shower by herself, she could not
3 wash her hair because the movement made her “motion sick.” (Tr. 76.) Plaintiff’s sister
4 helped wash her hair. (*Id.*) Plaintiff further testified that she had trouble concentrating
5 and poor recall, and that she often had to ask someone to explain things to her, such a
6 stories on the radio. (Tr. 78.) She also testified that she only left the house for doctor’s
7 appointments. (*Id.*)

8 Vocational expert Gretchen Bakkhenson also testified at the administrative
9 hearing. (Tr. 80-87.) The ALJ described a hypothetical individual with Plaintiff’s age,
10 education, prior work experience, and who was limited to medium exertion, but could
11 never climb ladders, ropes, or scaffolds and who could not work around large bodies of
12 water, unprotected heights, dangerous machinery, or operate motor vehicles. (Tr. 83-84.)
13 The vocational expert testified that a person with those limitations could perform
14 Plaintiff’s past relevant work as an administrative assistant, accounting manager, and
15 office manager. (Tr. 82-84.)

16 In response to a question from Plaintiff’s attorney, the vocational expert testified
17 that an individual who had to lie down during the day for longer than normal breaks
18 would be unable to sustain any work. (Tr. 86.) She also testified that an individual who
19 became physically ill around movement would be unable to work. (Tr. 86-87.)

20 **IV. The ALJ’s Decision**

21 A claimant is considered disabled under the Social Security Act if she is unable
22 “to engage in any substantial gainful activity by reason of any medically determinable
23 physical or mental impairment which can be expected to result in death or which has
24 lasted or can be expected to last for a continuous period of not less than 12 months.”
25 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(a)(3)(A) (nearly identical standard
26 for supplemental security income disability insurance benefits). To determine whether a
27 claimant is disabled, the ALJ uses a five-step sequential evaluation process. *See*
28 20 C.F.R. §§ 404.1520, 416.920.

A. Five-Step Evaluation Process

In the first two steps, a claimant seeking disability benefits must initially demonstrate (1) that she is not presently engaged in a substantial gainful activity, and (2) that her impairment or combination of impairments is severe. 20 C.F.R. § 404.1520(a) (c). If a claimant meets steps one and two, she may be found disabled in two ways at steps three through five. At step three, she may prove that her impairment or combination of impairments meets or equals an impairment in the Listing of Impairments found in Appendix 1 to Subpart P of 20 C.F.R. pt. 404. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is presumptively disabled. If not, the ALJ determines the claimant's RFC. At step four, the ALJ determines whether a claimant's RFC precludes her from performing her past work. 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant establishes this prima facie case, the burden shifts to the government at step five to establish that the claimant can perform other jobs that exist in significant number in the national economy, considering the claimant's RFC, age, work experience, and education. If the government does not meet this burden, then the claimant is considered disabled within the meaning of the Act.

B. The ALJ's Application of the Five-Step Evaluation Process

Applying the five-step sequential evaluation process, the ALJ found that Plaintiff had not engaged in substantial gainful activity since the July 16, 2010 alleged disability onset date. (Tr. 14.) At step two, the ALJ found that Plaintiff had the following severe impairments: "history of cervical fracture, status post C2-C3 surgery with fusion, cervical and lumbar radiculopathy, dizziness/vertigo, migraine headaches, and obesity." (*Id.*) At the third step, the ALJ found that the severity of Plaintiff's impairments did not meet or medically equal the criteria of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 17.) The ALJ next concluded that Plaintiff retained the RFC "to perform a range of light work, as defined in 20 C.F.R. § 404.1567(b) and § 416.967(b) except for the inability to climb ladders, ropes, or scaffolds but could perform the other postural functions frequently." (*Id.*) The ALJ also found that Plaintiff should "avoid

1 work in environments with hazards such as unprotected heights, dangerous machinery, or
2 large bodies of water,” and that she should “avoid operati[ng] motor vehicles,
3 and . . . fumes, odors, gases, or other pulmonary irritants.” (*Id.*)

4 The ALJ concluded that Plaintiff could perform her “past relevant work as an
5 administrative assistant, accounting manager, and office manager.” (Tr. 21.)
6 Accordingly, the ALJ concluded that Plaintiff was not disabled under the Act. (Tr. 22.)

7 **V. Standard of Review**

8 The district court has the “power to enter, upon the pleadings and transcript of
9 record, a judgment affirming, modifying, or reversing the decision of the Commissioner,
10 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The district
11 court reviews the Commissioner’s final decision under the substantial evidence standard
12 and must affirm the Commissioner’s decision if it is supported by substantial evidence
13 and it is free from legal error. *Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1198
14 (9th Cir. 2008); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Even if the ALJ
15 erred, however, “[a] decision of the ALJ will not be reversed for errors that are
16 harmless.” *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

17 Substantial evidence means more than a mere scintilla, but less than a
18 preponderance; it is “such relevant evidence as a reasonable mind might accept as
19 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
20 (citations omitted); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). In
21 determining whether substantial evidence supports a decision, the court considers the
22 record as a whole and “may not affirm simply by isolating a specific quantum of
23 supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (internal
24 quotation and citation omitted).

25 The ALJ is responsible for resolving conflicts in testimony, determining
26 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
27 Cir. 1995). “When the evidence before the ALJ is subject to more than one rational
28

1 interpretation, [the court] must defer to the ALJ's conclusion." *Batson v. Comm'r of Soc.*
2 *Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004) (citing *Andrews*, 53 F.3d at 1041).

3 **VI. Plaintiff's Claims**

4 In her opening brief, Plaintiff claims that "[t]he ALJ failed to properly consider the
5 claimant's peripheral vestibular dysfunction" (Doc. 20 at 10), "[t]he ALJ failed to
6 properly consider the claimant's migraines and peripheral neuropathy in her decision"
7 (Doc. 20 at 13), "[t]he ALJ erred by mischaracterizing the claimant's testimony"
8 (Doc. 20 at 15), and the ALJ did not "provide specific, germane reasons for discounting
9 [the] lay witness[]" statement. (Doc. 20 at 17.) The Commissioner argues that the ALJ's
10 decision is free from legal error and is supported by substantial evidence in the record.
11 (Doc. 21.)

12 **A. The ALJ's Consideration of Peripheral Vestibular Dysfunction (PVD)**

13 Plaintiff argues that the ALJ erred by referring to her PVD as "dizziness/vertigo."
14 (Doc. 20 at 11.) She contends that ALJ's RFC determination did not account for the
15 seriousness of Plaintiff's PVD. (*Id.*) She also argues that the ALJ did not consider PVD
16 under the correct listing, 2.07 disturbance of labyrinthine-vestibular function. (*Id.* at 13.)

17 The ALJ discussed the August 2010 VNG study that was conducted to determine
18 whether Plaintiff suffered from PVD. (Tr. 18-19.) The ALJ noted that the test was
19 "inconclusive and incomplete," and that the "VNG was abnormal due to incomplete
20 caloric irrigation." (*Id.*) Although the audiologist noted that the abnormality was "likely
21 due to [PVD]," she recommended that Plaintiff's treating neurologist complete warm air
22 irrigations to that the VNG could be completed. (Tr. 19 (citing Admin. Hrg. Ex. 4F at
23 12).) However, the record did not include any indication that the VNG test was
24 completed. (Tr. 19.)

25 The ALJ discussed Plaintiff's claims of PVD and her related symptoms of
26 dizziness and nausea. (Tr. 19.) Because the record does not include a confirmed
27 diagnosis of PVD, and Dr. Wang diagnosed Plaintiff with "peripheral vertigo," not PVD,
28 the ALJ did not err by finding Plaintiff's "dizziness/vertigo" a severe impairment, rather

1 than using the term PVD. (Tr. 14.) Moreover, the ALJ considered Plaintiff's complaints
2 of dizziness, motion sickness, and nausea in assessing an RFC that included "avoid[ing]"
3 the operation of motor vehicles, and avoiding unprotected heights, dangerous machinery,
4 large bodies of water, fumes, odors, gases, and "pulmonary irritants." (Tr. 19.)

5 Plaintiff also complains that the ALJ should have considered whether her PVD
6 met the criteria of the listing for "[d]isturbance of labyrinthine-vestibular functions," 20
7 C.F.R. pt. 404, subpart P, app. 1 § 2.07. (Doc. 20 at 12-13.) At step three of the
8 sequential evaluation process, the ALJ determines whether a claimant's impairments
9 meet or equal the criteria of any of the impairments that SSA has determined are
10 presumptively disabling, as set forth in the Listing of Impairments (the Listings). 20
11 C.F.R. §§ 404.1520, 416.920. Meeting the requirements of a listed impairment at Step
12 Three is "a very high standard." *McCoy v. Astrue*, 648 F.3d 605, 612 (8th Cir. 2011).
13 "Merely being diagnosed with a condition named in a listing and meeting some of the
14 criteria will not qualify a claimant for presumptive disability under the listing." *Id.* at
15 611-12. A claimant must satisfy all of the specified medical requirements of a particular
16 listing. *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990). "An impairment that manifests
17 only some of those criteria, no matter how severely, does not qualify." *Id.* at 531.

18 Listing 2.07 requires "a history of frequent attacks of balance disturbance, tinnitus,
19 and progressive hearing loss" with both "[d]isturbed function of vestibular labyrinth,
20 demonstrated by caloric or other vestibular tests," and "hearing loss established by
21 audiometry." 20 C.F.R. Pt. 404, subpt. P, App. 1 § 2.07. Plaintiff argues that a
22 Rhomberg's test (Tr. 284, 291), the VNG study (Tr. 275), her "ear problems (Tr. 398),
23 and phonophobia from her migraines (Tr. 286, 290) satisfied the criteria for listing 2.07.
24 (Doc. 20 at 13.)

25 As previously stated, the VNG test was inconclusive. Additionally, Plaintiff does
26 not explain how her citation to a 2010 treatment note recording Plaintiff's statement that
27 "her visual symptoms have been worse to deal with than her ear problems in recent past"
28 (Doc. 20 at 13 (citing Tr. 398)) satisfies Listing 2.07's criteria of "hearing loss

1 established by audiometry.” In short, Plaintiff did not introduce “medical findings equal
2 in severity to all criteria” for that listing. *See Sullivan*, 493 U.S. at 531.

3 **B. The ALJ’s Consideration of Migraines and Peripheral Neuropathy**

4 **1. Migraine Headaches**

5 Plaintiff next argues that, although the ALJ considered Plaintiff’s migraines a
6 severe impairment, she erred by failing to include any limitations in Plaintiff’s RFC for
7 migraines. (Doc. 20 at 14.) Plaintiff asserts, without citing any legal authority, that
8 “[r]easonable accommodations for migraines might be avoiding bright lights, loud noises,
9 [and] opportunities for unscheduled breaks or leav[ing] early” (Doc. 20 at 14.)

10 Although the ALJ found Plaintiff’s migraine headaches a severe impairment
11 (Tr. 14), she later noted Plaintiff’s testimony that her migraine headaches were treated by
12 sleeping and taking Excedrin. (Tr. 18). She also noted that a 2010 MRI of Plaintiff’s
13 brain did not show evidence of “acute infarct, mass lesion, or abnormal enhancement.”
14 (Tr. 18 (citing Admin. Hrg. Ex. 4F at 13).) Thus, even if the ALJ did not consider
15 Plaintiff’s migraines in determining her RFC, the ALJ did not error because she did not
16 find limitations related to Plaintiff’s migraines. *See* 20 C.F.R. § 416.945(a) (stating that a
17 claimant’s “impairment(s) and any related symptoms . . . *may* cause physical and mental
18 limitations that affect what you can do in a work setting.”) (emphasis added).

19 Additionally, Plaintiff’s speculation regarding the existence of “reasonable
20 accommodations” for migraine headaches is not pertinent to a claim for disability
21 insurance benefits under the Act. In the context of a claim for disability benefits under
22 Title II of the Act, the RFC establishes a claimant’s maximum abilities considering her
23 limitations or restrictions. 20 C.F.R. § 416.945(a). In other words, “the RFC is meant to
24 describe the claimant’s residual abilities or what the claimant can do, not what maladies a
25 claimant suffers from — though the maladies will certainly inform the ALJ’s conclusion
26 about the claimant’s abilities.” *Howard v. Comm’r of Soc. Sec.*, 276 F.3d 235, 240 (6th
27 Cir. 2002), *limited on other grounds as explained by Webb v. Comm’r of Soc. Sec.*, 368
28 F.3d 629, 631-33 (6th Cir. 2004). Plaintiff’s RFC should not be confused with

1 “reasonable accommodations” that arise in the context of employment-related disability
 2 claims, such as claims under the Americans with Disabilities Act (ADA). *See In Kimbro*
 3 *v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir.), *cert. denied*, 498 U.S. 814 (1990)
 4 (holding that a leave of absence was a reasonable accommodation for an employee whose
 5 cluster migraine headaches, a condition for which there was no specific treatment
 6 program, caused him to miss work sporadically); *Cleveland v. Policy Mgmt. Sys Corp.*,
 7 526 U.S. 795, 803 (1999) (explaining that “when the SSA determines whether an
 8 individual is disabled for [Social Security disability insurance] purposes, it does not take
 9 the possibility of ‘reasonable accommodation’ into account”). Accordingly, the ALJ did
 10 not err by failing to consider “reasonable accommodations” for Plaintiff’s migraines.

11 **2. Peripheral Neuropathy**

12 Plaintiff also argues that the ALJ erred by not addressing the peripheral
 13 neuropathy in Plaintiff’s arms and legs despite those issues being mentioned in the
 14 application for benefits (Tr. 181), an electromyography study showing sensory
 15 polyneuropathy affecting the right sural and medial plantar nerves (Tr. 270), and
 16 treatments notes showing polyneuropathy as a diagnosis (Tr. 399, 445). (Doc. 20 at 14.)
 17 Plaintiff argues that neuropathy causes numbness, pain, and nerve damage, and thus
 18 “causes problems standing and walking.” (Doc. 20 at 15.) Plaintiff asserts that
 19 “[n]umbness and pain in the feet *would* affect the ability to stand and walk.” (*Id.*
 20 (emphasis added).)

21 Plaintiff’s general discussion of neuropathy does not support her claim of error.
 22 Plaintiff cannot establish that her neuropathy was a severe impairment or that it was
 23 disabling by discussing the potential symptoms and limitations that may result from that
 24 condition. The existence of any condition is not enough for it to be disabling, there must
 25 be some related functional loss. *See* 20 C.F.R. §§ 404.1505(a), 404.1529(c). Plaintiff has
 26 the burden of “proving that [her] impairments or their symptoms affect his ability to
 27 perform basic work activities.” *See Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th
 28 Cir. 2001). Here, although Plaintiff claims that neuropathy in her lower extremities

1 “would affect the ability to walk or stand,” (Doc. 2 at 15), she does not cite to record
 2 evidence indicating that her ability to stand and walk was limited by her alleged
 3 neuropathy. *See Bickell v. Astrue*, 343 F. App’x 275, 278 (9th Cir. 2009) (unpublished)
 4 (a claimant’s reliance on medical diagnoses that the ALJ rejected at step two was
 5 unavailing as the diagnoses did not identify any functional limitations). Accordingly,
 6 even if the ALJ erred by failing to discuss Plaintiff’s allegations of peripheral neuropathy,
 7 that error was harmless.

8 **C. Plaintiff’s Symptom Testimony**

9 **1. Assessing a Claimant’s Credibility**

10 Plaintiff next argues that the ALJ erred by rejecting her symptom testimony.
 11 (Doc. 20 at 15.) An ALJ engages in a two-step analysis to determine whether a
 12 claimant’s testimony regarding subjective pain or symptoms is credible. *Lingenfelter v.*
 13 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). “First, the ALJ must determine whether
 14 the claimant has presented objective medical evidence of an underlying impairment
 15 ‘which could reasonably be expected to produce the pain or other symptoms alleged.’”
 16 *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)).

17 The claimant is not required to show objective medical evidence of the pain itself
 18 or of a causal relationship between the impairment and the symptom. *Smolen*, 80 F.3d at
 19 1282. Instead, the claimant must only show that an objectively verifiable impairment
 20 “could reasonably be expected” to produce her pain. *Lingenfelter*, 504 F.3d at 1036
 21 (quoting *Smolen*, 80 F.3d at 1282); *see also Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d
 22 1155, 1160-61 (9th Cir. 2008) (“requiring that the medical impairment could reasonably
 23 be expected to produce pain or another symptom . . . requires only that the causal
 24 relationship be a reasonable inference, not a medically proven phenomenon”). It is
 25 undisputed that Plaintiff presented evidence of an impairment that could produce the
 26 alleged symptoms.

27 Second, if a claimant produces medical evidence of an underlying impairment that
 28 is reasonably expected to produce some degree of the symptoms alleged, and there is no

1 affirmative evidence of malingering, an ALJ must provide “clear and convincing
 2 reasons” for an adverse credibility determination.³ See *Smolen*, 80 F.3d at 1281; *Gregor*
 3 *v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006). When evaluating a claimant’s credibility,
 4 the ALJ may consider the objective medical evidence, the claimant’s daily activities, the
 5 location, duration, frequency, and intensity of the claimant’s pain or other symptoms,
 6 precipitating and aggravating factors, medication taken, and treatments for relief of pain
 7 or other symptoms. See 20 C.F.R. § 404.1529(c); *Bunnell*, 947 F.2d at 346.

8 An ALJ may also consider such factors as a claimant’s inconsistent statements
 9 concerning symptoms and other statements that appear less than candid, the claimant’s
 10 reputation for lying, unexplained or inadequately explained failure to seek treatment or
 11 follow a prescribed course of treatment, medical evidence tending to discount the severity
 12 of the claimant’s subjective claims, and vague testimony as to the alleged disability and
 13 symptoms. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008); *Smolen*, 80
 14 F.3d at 1284. If substantial evidence supports the ALJ’s credibility determination, that
 15 determination must be upheld, even if some of the reasons cited by the ALJ are not
 16 correct. *Carmickle*, 533 F.3d at 1162.

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 21 ³ Relying on the Ninth Circuit’s decision in *Bunnell*, the Commissioner argues
 22 that an ALJ need not provide “clear and convincing” reasons for discrediting a claimant’s
 23 testimony regarding subjective symptoms, and instead must make findings that are
 24 “‘supported by the record’ and ‘sufficiently specific to allow a reviewing court to
 25 conclude the adjudicator rejected the claimant’s testimony on permissible grounds.’”
 26 (Doc. 21 at 12 n.3 (citing *Bunnell*, 947 F.2d at 345-46).) In *Bunnell*, the court did not
 27 apply the “clear and convincing” standard, and the Commissioner argues that because no
 28 subsequent en banc court has overturned *Bunnell*, its standard remains the law of the
 Ninth Circuit. (Doc. 18 at 8-9.) Although the Ninth Circuit has not overturned *Bunnell*,
 subsequent cases have elaborated on its holding and have accepted the clear and
 convincing standard. See *Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234
 (9th Cir. 2011); *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009); *Lingenfelter*, 504
 F.3d at 1036; *Reddick*, 157 F.3d at 722; *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir.
 1989). Accordingly, the Court will determine whether the ALJ provided clear and
 convincing reasons for discounting Plaintiff’s credibility.

2. The ALJ's Credibility Determination

Here, Plaintiff testified at the administrative hearing that she could not work due to dizziness and nausea. (Tr. 18.) She also testified that she could sit or stand for fifteen minutes and walk ten to fifteen yards, and that various movements made her nauseous or caused vomiting. (*Id.*) The ALJ found Plaintiff's testimony regarding the severity of her symptoms "diminished." (Tr. 18.) Plaintiff argues that the ALJ erred in discounting her subjective complaints because she did not point to anything in Plaintiff's testimony or her daily activities that suggested that she was capable of light work, and other than noting that she was able to drive herself or ride in a car to her last job. (Doc. 20 at 16.) She asserts that the ALJ did not give any other reasons for discounting Plaintiff's credibility. (*Id.* at 16-17.)

Because there was no evidence of malingering (Tr. 18), the ALJ was required to provide clear and convincing reasons for concluding that Plaintiff's subjective complaints were not wholly credible. Contrary to Plaintiff's assertion, the ALJ gave several clear and convincing reasons to support her credibility determination, including that Plaintiff's testimony that she was unable to drive or ride in a car was inconsistent with her extended commute to her last job, Plaintiff was noncompliant with physical therapy, her alleged limitations were inconsistent with the medical record, and there were gaps in Plaintiff's treatment for her musculoskeletal symptoms. (Tr. 20.)

The ALJ properly discounted Plaintiff's credibility on these grounds. As part of the overall disability analysis, and in weighing various allegations and opinions, the ALJ must consider whether there are any inconsistencies in the evidence, such as Plaintiff's inconsistent statements. *See* 20 C.F.R. § 404.1529(c)(4) (stating that an ALJ must consider "whether there are any inconsistencies in the evidence"); SSR 96-7p, 1996 WL 374186, at *5 (stating that a strong indicator of the credibility an individual's statements is their consistency, both internally and with other information in the record); *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005) ("Credibility determinations do bear on evaluations of medical evidence when an ALJ is presented with conflicting medical

1 opinions or an inconsistency between a claimant's subjective complaints and his
2 diagnosed condition."). Thus, the ALJ properly considered the inconsistency between
3 Plaintiff's testimony that she could not drive or ride in a car and evidence that she had an
4 extended commute to her last job and either drove or rode in a car to get there. (*Compare*
5 *Tr. 72 with Tr. 71.*)

6 The ALJ also properly discounted Plaintiff's symptom testimony regarding
7 dizziness, nausea, and motion sickness based on her noncompliance with treatment for
8 vestibular rehabilitation. (Tr. 19.) A claimant's failure to comply with treatment is a
9 legitimate basis for discounting a claimant's subjective complaints. *See Morris v. Astrue*,
10 2012 WL 3548040, at *4 (C.D. Cal. Oct. 18, 2012) ("Plaintiff's allegation he suffers from
11 disabling pain is undermined by his failure to consistently seek treatment, to use any
12 medication, and by solely conservative treatment . . .").

13 Here, the record reflects that Plaintiff attended five physical therapy appointments
14 that Dr. Wang prescribed for vestibular exercise. (Tr. 284, Tr. 397, 394, 391, 390, 388.)
15 The record also reflects that Plaintiff missed four other appointments. (Tr. 389, 392, 393,
16 394-95.) Plaintiff argues that she missed one physical therapy appointment because she
17 was "too dizzy to drive." (Doc. 22 at 7 (citing Tr. 392).) The record, however, reflects
18 that she missed an appointment because she thought she had shingles (Tr. 394-95), was a
19 no-show for another appointment (Tr. 393), and missed another appointment because she
20 "could not get out of bed," but does not provide further explanation. (Tr. 389.) The ALJ
21 is responsible for resolving conflicts in testimony, determining credibility, and resolving
22 ambiguities. *See Andrews*, 53 F.3d at 1039. The ALJ reasonably concluded that, based
23 on her missed physical therapy appointments, Plaintiff was noncompliant with treatment.⁴
24 Although the record evidence could be construed more favorably to Plaintiff, "[w]hen the

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27 ⁴ Having found that the missed therapy appointments support the ALJ's
28 conclusion that Plaintiff was non-compliant with treatment for vestibular rehabilitation,
the Court does not address the ALJ's other grounds for finding Plaintiff's non-compliant
with that treatment. (Tr. 19.)

1 evidence before the ALJ is subject to more than one rational interpretation, [the court]
2 must defer to the ALJ's conclusion." *Batson*, 359 F.3d at 1198.

3 Moreover, even if the ALJ erred in discounting Plaintiff's symptom testimony
4 related to her dizziness, nausea, and motion sickness, any error was harmless because the
5 ALJ gave Plaintiff "the benefit of the doubt" and considered these symptoms in assessing
6 an RFC that included findings that she should "avoid work in environments with hazards
7 such as unprotected heights, dangerous machinery, or around large bodies of water; avoid
8 operation of motor vehicles; and avoid work in environments with fumes, odors, gases, or
9 other pulmonary irritants." (Tr. 19.)

10 The ALJ also properly discounted Plaintiff's symptom testimony regarding
11 limitations on her ability to sit or stand due her musculoskeletal impairments because her
12 complaints of extreme limitations were inconsistent with the medical record and there
13 were gaps in her treatment for musculoskeletal impairments. (Tr. 19-20.) As part of the
14 overall disability analysis, the ALJ must consider whether there are any inconsistencies in
15 the evidence. *See* 20 C.F.R. § 404.1529(c)(4) (stating that an ALJ must consider
16 "whether there are any inconsistencies in the evidence."); SSR 96-7p, 1996 WL 374186,
17 at *5 (stating that a strong indicator of the credibility an individual's statements is their
18 consistency, both internally and with other information in the record); *Webb*, 433 F.3d at
19 688 ("Credibility determinations do bear on evaluations of medical evidence when an
20 ALJ is presented with conflicting medical opinions or an inconsistency between a
21 claimant's subjective complaints and his diagnosed condition.").

22 Here, although Plaintiff testified that she could stand or sit for fifteen minutes
23 before she had to shift position or her legs began to ache, the medical record contained
24 evidence that Plaintiff's cervical radiculopathy was "mild" (Tr. 19 (citing Admin. Hrg.
25 Ex. 4F at 30-31)), an MRI of the cervical spine did not reveal any "significant forminal or
26 central canal stenosis" (Tr. 19 (citing Admin. Hrg. Ex. 4F at 15)), and an MRI of
27 Plaintiff's lumbar spine showed "mild degenerative changes," with "mild foraminal
28 narrowing and no significant spinal canal stenosis. (Tr. 19 (citing Hrg. Ex. 4F at 14.)

1 The ALJ properly discounted Plaintiff's credibility based on the inconsistencies between
2 Plaintiff's allegations of extreme limitations and the medical records showing that
3 Plaintiff's medical conditions were "mild." *See Stubbs-Danielson v. Astrue*, 539 F.3d
4 1169, 1175 (9th Cir. 2008) (claimant's credibility was undermined when her allegations
5 about her symptoms were disproportionate and not supported by objective medical
6 findings).

7 Additionally, the ALJ gave great weight to the opinion of examining physician
8 Dr. Levison, which supported the ALJ's finding that Plaintiff's alleged functional
9 limitations were inconsistent with the medical record.⁵ (Tr. 20.) On physical
10 examination, Dr. Levison found no abnormalities. (Tr. 404.) He found that Plaintiff had
11 a normal gait, could heel-toe walk, hop on either leg, squat, and tandem walk. (Tr. 404.)
12 He also noted that she had a full range of motion in her joints and her spine, no
13 tenderness in her spine, full muscle strength in her arms and legs, and full grip strength.
14 (Tr. 405.) Dr. Levison concluded that "examination today is completely normal from
15 head to toe." (*Id.*)

16 The ALJ further noted that, before the disability onset date, in 2006 Plaintiff had
17 cervical facet joint nerve blocks and cervical epidural steroid injections with little

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19 ⁵ In her opening brief, Plaintiff does not argue that the ALJ erred by assigning
20 great weight to Dr. Levison's opinion. (Doc. 20.) Rather, she only asserts the following
21 claims: "A. The ALJ failed to properly consider the claimant's peripheral vestibular
22 dysfunction" (Doc. 20 at 10); "B. The ALJ failed to properly consider the claimant's
migraines and peripheral neuropathy in her decision" (Doc. 20 at 13), "C. The ALJ erred
by mischaracterizing the claimant's testimony" (Doc. 20 at 15), and the ALJ did not
"provide specific, germane reasons for discounting lay witnesses." (Doc. 20 at 17.)

23 In her opening brief, Plaintiff challenges the ALJ's statement that the "physical
24 consultative exam was essentially normal (Doc. 20 at 12 (citing Tr. 20)) by arguing that
25 the consultative "exam did not perform a Rhomberg test to assess vestibular dysfunction
26 despite it only taking a minute and the examiner knew that the major issue was peripheral
27 vestibular dysfunction." (Doc. 20 at 12.) Plaintiff, however, raised this issue in the
28 context of her claim that the ALJ erred in failing to consider her peripheral vestibular
dysfunction a severe impairment, and did not argue that the ALJ erred in assigning
weight to Dr. Levison's opinion regarding Plaintiff's ability to perform work-related
physical activities. (Doc. 20 at 10-12.) Accordingly, the Court will not consider whether
the ALJ properly assigned weight to Dr. Levison's opinion. *See Carmickle v. Comm'r
Soc. Sec. Admin*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2007) (noting that the court generally
will not consider matters that are not specifically and distinctly raised in an opening
brief).

improvement. (Tr. 20 (citing Admin. Hrg. Exs. 1F, 2F, 3F at 2.) Plaintiff, however, did not pursue other recommended treatment because she claimed such treatment had not been helpful in the past. (Tr. 20 (citing Admin. Hrg. Ex. 3F at 2).) The record reflects that Plaintiff did not seek further treatment for those particular symptoms until July 2010. (Tr. 289.) The ALJ did not err in discounting Plaintiff's subjective complaints based on a gap in her treatment history between 2006 and 2010. The treatment the claimant received is a legitimate consideration in a credibility finding. *See Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (the ALJ properly considered the physician's failure to prescribe, and the claimant's failure to request, medical treatment commensurate with the "supposedly excruciating pain" alleged); *see also Burch*, 400 F.3d at 681 (finding the ALJ's consideration of the claimant's failure to see treatment for a three or four month period was "powerful evidence" and an "ALJ is permitted to consider lack of treatment in his credibility determination). Moreover, even if the ALJ erred by rejecting Plaintiff's symptom testimony related to her musculoskeletal impairments, any error was harmless because he gave Plaintiff the "benefit of the doubt" and assessed her with an RFC "at the light exertional level with postural restrictions." (Tr. 20.)

D. Lay Witness Testimony

Finally, Plaintiff argues that the ALJ erred because she did not provide legally sufficient reasons for discounting the third-party statement from her sister Lacey Brimmer. (Doc. 20 at 17.) As stated in 20 C.F.R. §§ 404.1513(d) and 416.913(d), an ALJ may, "in addition to evidence from the acceptable medical sources . . . also use evidence from other sources to show the severity of [a claimant's] impairment(s) and how it affects his ability to work." 20 C.F.R. §§ 404.1513(d), 416.913(d) (2005). Such other sources include spouses, parents and other care givers, siblings, other relatives, friends, neighbors, and clergy. 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4). Thus, lay witness testimony by family members who have the opportunity to observe a claimant on a daily basis "constitutes qualified evidence" that the ALJ must consider. *Sprague v. Bowen*, 812 F.2d 1226, 1231-32 (9th Cir. 1987); *see Dodrill v. Shalala*, 12 F.3d 915, 919

(9th Cir. 1993) (“[a]n eyewitness can often tell whether someone is suffering or merely malingering [T]his is particularly true of witnesses who view the claimant on a daily basis”). To reject lay testimony, an ALJ must give reasons “germane to each witness” for doing so. *Dodrill*, 12 F.3d at 919.

Here, the ALJ gave “little weight” to Ms. Brimmer’s third-party report because her answers to the questions on the form were essentially the same as Plaintiff’s report of her subjective complaints, and the ALJ rejected Plaintiff’s subjective complaints. (Tr. 21.) As the ALJ noted, the lay witness testimony did not describe any limitations not already reported by Plaintiff. The ALJ properly found that clear and convincing reasons for discounting Plaintiff’s subjective complaints applied to the lay witness’s testimony. *See Pederson v. Comm’r Soc. Sec. Admin.*, 405 F. App’x 117, 119 (9th Cir. 2010) (citing *Stout v. Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006)) (stating that when lay testimony essentially repeated claimant’s self-imposed limitations and reports of pain, and ALJ found claimant lacked credibility, and another lay witness’ testimony did not materially add to claimant’s own statements, failure to discuss the testimony was harmless because “no reasonable ALJ would have reached a different result based on that testimony.”).

VII. Conclusion

Based on the Court’s review of the record, the Court finds that the Commissioner’s decision is free from harmful legal error and is supported by substantial evidence in the record. Accordingly, the Court affirms the Commissioner’s decision.

Accordingly,

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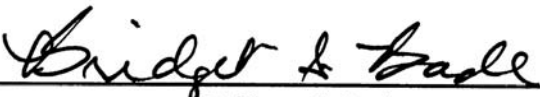
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1 **IT IS ORDERED** that the Commissioner's decision denying Plaintiff's
2 application for disability insurance benefits is **AFFIRMED**. The Clerk of Court is
3 directed to enter judgment in favor of Defendant and to terminate this action.

4 Dated this 31st day of July, 2014.

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9 Bridget S. Bade
10 United States Magistrate Judge
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